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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

NAVEEN CHOPRA et al., Plaintiffs and Respondents, v. ADVO, INC., Defendant and Appellant.	A103168 (Alameda County Super. Ct. No. H-221306-2)

ADVO, Inc. (ADVO) appeals after a jury verdict found in favor of Naveen Chopra (Chopra), Amarjit Grewal (Grewal), Surgit Kaur (Kaur), Sucha Leader (Leader), and Veena Singh (Singh) on their claim of discrimination based on national origin. ADVO contends that substantial evidence did not support the verdict and the court erred in giving BAJI No. 12.01 without ADVO's proposed modification. We affirm.

BACKGROUND

ADVO prepares and distributes direct mail advertising on behalf of its corporate clients. It has 19 production facilities across the country; this case involves its facility in Newark, California (Newark facility). ADVO's Newark facility had regular hourly workers and temporary workers provided by a staffing agency.

Madelina Williams (Williams) was the regional director of human resources for the northwestern region, which includes the Newark facility. She began working at ADVO on November 1, 1999. Her job duties included establishing and implementing human resources policies.

Wendy Roe (Roe) was the human resources manager at the Newark facility until her employment was terminated in February 2000. Roe had remarked to Williams that some of the temporary employees at the Newark facility who were not from East India were feeling excluded by the East Indian employees.

In March 2000, Williams hired Donna Perry (Perry) as the new human resources manager for the Newark facility. Perry testified that Williams told her at her hiring interview that the production numbers at the Newark facility were low and "that was a big issue." Williams also reported to her that the "ethnic makeup of the staff sometimes could be an issue." Perry was aware that 85 to 90 percent of the staff were East Indian, and she noted that she "possibly" was told this at her initial interview. Perry stated that Williams had discussed with her "the lack of diversity in hiring, and [that] diversity is an important aspect of any human resources department." She testified that Williams had expressed concern that temporary employees had complained about cliquishness among the East Indian production workers. When deposed, Perry asserted that Williams told her to "get a variety of people in age group, group-wise, racial breakdown . . . ."

Perry testified that Williams expressed concern about the staffing agency ADVO was using because it was primarily recruiting employees of East Indian national origin. Williams reportedly stated that the agency relied on referrals of people who were already working there, and they tended to be East Indian. Perry explained that this "staffing agency was an East Indian owned or operated agency."[1]

Perry also testified that Williams told her about a prior incident involving East Indian employees. Williams told Perry that years ago, when the production facility was located in Union City, a group of East Indian production workers had slowed down as a result of a working condition issue. Counsel asked Perry whether "[Williams] indicated to you . . . that her feelings that if there was any kind of group action by the East Indian workers on her watch, that the best way to deal with it would be prompt and strong discipline . . . ?" Perry responded, "Yes."

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[1] After plaintiffs' employment ended, ADVO used a new staffing agency.

Chopra, Grewal, Kaur, Leader, and Singh (collectively plaintiffs) had worked at ADVO for a number of years. All of the plaintiffs are East Indian. Chopra began working at ADVO in November 1990; Grewal started in March 1988; Kaur began in 1992; Leader started in July 1987; and Singh began in September 1989.[2] Plaintiffs prepared single pieces of advertising mail. They operated two machines, feeding in the raw copy at the front, sorting the copy by zip code, and placing the finished product on pallets at the end. Throughout their employment, none of the plaintiffs had been disciplined and each had received a good performance review.

Bill Wright (Wright) supervised plaintiffs. He began working at ADVO on September 19, 1994, and he ultimately became the production manager. After September 2000, his job title was the western regional postal relations manager. Wright testified that in the month before July 8, 2000, Newark had the worst production numbers for all of ADVO's facilities. Wright asked plaintiffs to increase their production.

On Saturday, July 8, 2000, plaintiffs arrived at work at 6:00 a.m. Following the first break, after 9:00 a.m., Wright came and watched plaintiffs work. He stood very close to them and wrote in a book he was holding. Plaintiffs were upset because Wright was standing so close to them.

After the lunch break, at about 11:45 a.m., Wright stood so close to Leader that he almost touched his shoulders and made it difficult for him to walk around the two machines. Leader asked: "Bill, is there any change you are going to do today?" According to Leader, Wright yelled: "Shut down the machine and come over here." Everybody surrounded Wright, who told them that he would like to put two people on the machine to do 80,000 for the day. He said that if three people were on the machine, he wanted 120,000 for that machine each day.[3] Chopra responded that it was impossible. Wright's face became red and he said loudly that if they could not do that, then they

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[2] Singh's services were briefly interrupted twice while she traveled, but she resumed work at ADVO after returning to the United States.

[3] The record refers to 120 rather than 120,000 at some places.

would have to "go out the other door"; he pointed to the door. Leader and Chopra, and possibly others, put their ADVO access cards[4] down on the table and started to leave. Wright told them they were not going anywhere and ordered them into the office. All of the plaintiffs entered the office.

Leader testified that the office was very small, about 8 by 10 feet, and they remained there for about 45 minutes. He said that Wright told them if they could not do the production, then they would have to leave. Plaintiffs answered that the numbers he wanted were impossible. Wright became angrier and he continued to yell and he started to bang on the table about three or four times. Wright asked plaintiffs how they would support themselves if they did not have jobs at ADVO and Leader answered that God would take care of them. Wright responded that God was not writing the check; he was writing the check. Leader told Wright that they were not slaves, and Wright responded: "As long as you guys work here, you guys are slaves."

Wright repeatedly told them that if they could not do the work, they could go out the door. Leader decided that they needed to talk to human resources on Monday; plaintiffs decided to leave. As plaintiffs were exiting, Wright said he wanted to get Steve Scott (Scott), his supervisor. Leader said they were so nervous that they did not hear him clearly and did not realize that he said he was going to call Scott. Wright stood by the door while plaintiffs left. As they exited, Wright called them "Indian shit." None of the plaintiffs stated that he or she was quitting or that he or she was not coming back to work.

Plaintiffs left around 2:30 p.m., despite their shift lasting until 4:30 p.m. Wright and other managers finished the day's production.

On Monday morning at 8:00 a.m., plaintiffs went to the human resources office. Leader stated that he described the incident to Perry, who took extensive notes. Leader told her that he could not stay there and work under these conditions. Perry asked them if they were ready to come back to work on Wednesday; they responded that they were. Perry said that she would call them Tuesday and they could work on Wednesday.

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[4] Plaintiffs used these cards to get into the building and for clocking their time.

On Monday, Wright sent Perry a message detailing his version of the events. He noted, among other things, that Chopra and Leader threw their cards down on the table. Wright said that he never referred to them as slaves. He said that he never yelled or cursed at them. At trial the parties stipulated that, if called as witnesses, three individuals would have testified that Wright had a reputation for losing his temper. However, Perry stated that she only saw Wright yell at an East Indian manager once, which she recounted to Williams.

On the same Monday that plaintiffs met with Perry, Perry telephoned Williams. Williams recommended the termination of plaintiffs' employment. Williams explained the following as the reasons for her decision: "What I was thinking was, again, based on the information that was given to me that the plaintiffs refused to do some work that they were asked to do, that they had an opportunity to speak with Steve Scott and refused to talk to Steve Scott, that the comment was made that I'm quitting, and you guys can stay here and do what they want. They left their badges behind, and they left the building, and they left work undone. That was what my decision was based on. It wasn't based on any other facts, because I was not told of any other facts. . . ." Williams testified that the fact that plaintiffs were East Indian had nothing to do with her decision.

On that same Monday, July 10, Perry completed personnel termination forms for each plaintiff. On each form, she marked the box next to "job abandonment." She wrote that they walked off the job on Saturday, July 8, and refused to stay and complete scheduled work. Perry stated that the fact that plaintiffs were East Indian was irrelevant to the decision to terminate their employment.

On Tuesday, Perry called plaintiffs and told them that their jobs had been terminated because they had walked off the jobs. Perry told them separately that they had chosen to quit and were no longer employed with ADVO.

Neither Williams nor Perry recommended any discipline for Wright regarding the incident and he was not disciplined. Perry did, however, write a memorandum dated July 19, 2000, and placed it in Wright's file. The memorandum stated in relevant part: "Although you deny the negative statements that your crew stated you said and also deny

that you spoke to them with [anger] and used 'curse words', I am concerned that five employees were upset enough to walk off their jobs. Because of this I feel I need to emphasize our Harassment Policy to you so that we may avoid any situations, real or perceived, of this nature. [¶] Although our policy specifically addresses sexual and racial harassment, it also states that our workplace must be free of 'undesirable, unprofessional behavior' and that no associate should feel that their [*sic*] work environment is 'intimidating or offensive'."

None of the employees hired to replace plaintiffs was East Indian. Shortly after the incident involving plaintiffs, ADVO changed staffing agencies. About 40 percent of the new hires from this agency were East Indians while previously 80 percent of the new hires had been East Indians. From December 1999 through and until December 2000, the percentage of East Indian workers making up the regular workforce at the Newark facility decreased from 85 percent to approximately 66 percent.

Plaintiffs filed a complaint on July 6, 2001, and their first amended complaint on August 1, 2001. Their first amended complaint alleged six causes of action against ADVO and Wright, but only one claim, discrimination based on national origin in violation of the Fair Employment and Housing Act (FEHA) (Gov. Code, § 12940 et seq.), against ADVO proceeded to a jury trial.[5] Plaintiffs stipulated that they were not seeking economic damages.

After a two-week trial, the jury found ADVO liable for national origin discrimination and awarded each plaintiff $130,000 in emotional distress damages. The jury did not award punitive damages.

ADVO filed a timely notice of appeal.[6]

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[5] The record does not indicate whether the other claims were dismissed. ADVO asserts that the court granted summary judgment in favor of Wright, but this is not documented in the record.

[6] ADVO filed a motion in this court to toll post-judgment interest from the date plaintiffs' opening appellate brief was due until the date it was actually filed. We had granted plaintiffs' request for a 60-day extension to file their brief. ADVO had also

DISCUSSION

I. Substantial Evidence of Discrimination Based on National Origin

ADVO contends that substantial evidence does not support the judgment of discrimination based on plaintiffs' national origin of being East Indian in violation of FEHA (Gov. Code, § 12940, subd. (a)). Section 12940, subdivision (a) provides in relevant part: "It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification, . . . : [¶] (a) For an employer, because of the . . . national origin . . . to discharge the person from employment . . . ."

" 'When a finding of fact is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the finding of fact. [Citations.] [¶] When two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court.' [Citation.]" (*Scott v. Common Council* (1996) 44 Cal.App.4th 684, 689, quoting *Green Trees Enterprises, Inc. v. Palm Springs Alpine Estates, Inc.* (1967) 66 Cal.2d 782, 784-785.) The testimony of a single credible witness may constitute substantial evidence. (*In re Marriage of Mix* (1975) 14 Cal.3d 604, 614.)

It is undisputed that plaintiffs fall into a protected category as their national origin is East Indian. ADVO offered a lawful reason for its actions when it provided evidence that plaintiffs had left the workplace prior to the completion of their shift, but the jury verdict indicates that it rejected this explanation. Thus, the question is whether substantial evidence supported the finding that ADVO intentionally discriminated against plaintiffs.

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extended the time to file its opening brief, first, by stipulation, and then, again, with this court's permission. We issued an order that ADVO's motion to toll would be considered with the appeal. We deny ADVO's motion to toll post-judgment interest.

ADVO argues that plaintiffs introduced evidence that ADVO's explanation was merely a pretext, but that they did not establish a discriminatory motive. (See *Slatkin v. University of Redlands* (2001) 88 Cal.App.4th 1147, 1157.) The only evidence offered regarding intent, according to ADVO, was statements regarding diversity and the staffing agency made by Roe and Williams, and comments made by Wright. ADVO argues that Wright had no authority over employment decisions and the comments by the others were, at most, stray remarks, not substantial evidence of discriminatory motive. (See *Rubenstein v. Administrators of the Tulane Educ. Fund* (5th Cir. 2000) 218 F.3d 392, 400-401 (*Rubenstein*).)

ADVO maintains that this case resembles the situation in *Rubenstein, supra,* 281 F.3d 392. In *Rubenstein,* the Fifth Circuit held that the plaintiff, a Russian Jewish associate professor, had failed to show discrimination based on religion and national origin because the record indicated that the university's non-discriminatory purpose in denying him pay raises was based on his poor teaching skills. (*Id.* at p. 400.) A faculty member called him a "Russian Yankee" and a "commie" and made anti-Semitic remarks, while another faculty member had referred to him as "the Russian Jew" and commented that if he could obtain tenure, anyone could. (*Id.* at pp. 396-397, 400.) The Fifth Circuit, however, held this evidence was insufficient to overcome the defendant's motion for summary judgment because "in order for comments in the workplace to provide sufficient evidence of discrimination, they must be '1) related [to the protected class of persons of which the plaintiff is a member]; 2) proximate in time to the [complained-of adverse employment decision]; 3) made by an individual with authority over the employment decision at issue; and 4) related to the employment decision at issue.' " (*Id.* at pp. 400-401.) The foregoing criteria were not sufficiently satisfied by the stray remarks made by two faculty members, even though one had been involved in the employment decisions.

Similarly, here, ADVO argues that Roe's statements regarding the lack of diversity in the workplace were not proximate in time to the decision to terminate plaintiffs' employment and she had no authority over the decision. Wright's statements,

according to ADVO, were completely irrelevant because he played no part in the decision to terminate plaintiffs' employment. (See, e.g., *Bergene v. Salt River Project Agr. Imp. and Power* (9th Cir. 2001) 272 F.3d 1136, 1141.) Further, ADVO asserts that Williams's comments were isolated remarks. ADVO claims that the comments were made many months prior to the employment decision and were irrelevant to the decision. It contends that Williams merely voiced concern about the lack of diversity in the staff, but a concern regarding a lack of diversity is not substantial evidence.[7] ADVO argues that the comment that any group action by the East Indian workers should be met with prompt and strong discipline is insufficient evidence of discriminatory intent. Rather, ADVO claims that this remark, too, was simply a stray remark irrelevant to the decision to terminate plaintiffs' employment.

The jury, however, could very well have considered Williams's remarks to be substantially more than isolated, stray remarks. Federal courts have concluded that "stray remarks" are weak circumstantial evidence of discriminatory animus when they are uttered in an ambivalent manner and not tied directly to the employee's termination. (See, e.g., *Nesbit v. Pepsico, Inc.* (9th Cir. 1993) 994 F.2d 703, 705.) Here, Williams testified that she made the decision to terminate the employment of plaintiffs. Her comments that referred to the East Indian employees must be considered together, and not analyzed separately. (See, e.g., *Hasham v. California State Board of Equalization* (7th Cir. 2000) 200 F.3d 1035, 1049-1050.) Moreover, they were neither ambiguous nor unrelated in time. Williams expressed concern that the staff should be diversified because it was 85 to 90 percent East Indian. Even if she wanted a diverse work force, she could not legally achieve this goal by discriminating against East Indian employees on the basis of their national origin. (See, e.g., *Connecticut v. Teal* (1982) 457 U.S. 440, 454-455 [" 'It is clear beyond cavil that the obligation imposed by Title VII [of the Civil Rights Act of 1964] is to provide an equal opportunity for *each* applicant regardless of

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[7] ADVO cites *Altizer v. City of Roanoke* (W.D.Va. 2003) 2003 WL 1456514, a memorandum opinion not published in the reporter.

race, without regard to whether members of the applicant's race are already proportionately represented in the work force. [Citations.]' "].) Williams made these comments to Perry in March of 2000 and, just four months later, at the beginning of July, Williams terminated plaintiffs' employment.

In addition to her comments regarding the preponderance of East Indian employees and the need to diversify, Williams expressed dissatisfaction with the East Indian-owned or operated staffing agency, because she claimed it did not recruit widely enough. Further, she expressed concern about the "cliquishness" among the East Indian workers and the discomfort felt by others. Additionally, she told Perry about a prior work stoppage or slowdown involving East Indian workers and maintained that any type of group action by them should be met with prompt and strong discipline.

In *Rubinstein*, the court held that the isolated comments by two faculty members, standing alone, were insufficient evidence of discrimination. (*Rubinstein, supra,* 218 F.3d at p. 400.) Here, as already noted, the comments made by Williams, the person making the employment decision, were not unrelated in time. They also were not ambiguous in the respect that they clearly reflected a concern that the work force needed to have fewer East Indian employees. Moreover, these comments were offered in addition to significant other evidence. Shortly after ADVO terminated plaintiffs' employment, ADVO replaced the East Indian staffing agency with a different company. Thereafter, many of the new hires were not East Indian; the percentage of workers who were East Indian fell from 85 to 66 percent in approximately six months. None of the employees hired to replace plaintiffs was East Indian. Consequently, although there is no evidence regarding who made the actual decision to change the hiring agency, these statistics combined with Williams's remarks were sufficient to support a finding of intentional discrimination.

II. Giving BAJI No. 12.01

ADVO contends that the trial court erred in providing the jury with BAJI No. 12.01.[8] ADVO maintains that this instruction is based on the federal statute and not the FEHA and that the court should have given the modified version of this instruction proposed by ADVO.

The Supreme Court of California has rejected the theory that there is inherent prejudice from instructional errors in civil cases. (*Rutherford v. Owen-Illinois, Inc.* (1997) 16 Cal.4th 953, 983.) "[I]nstructional error requires reversal only, ' "where it seems probable" that the error "prejudicially affected the verdict." ' [Citation.]" (*Ibid.*) The burden lies on the appellant to demonstrate that a miscarriage of justice arose from the erroneous instruction. (*Ibid.*)

To determine whether the alleged error is prejudicial: "The reviewing court should consider not only the nature of the error, 'including its natural and probable effect on a party's ability to place his full case before the jury,' but the likelihood of actual prejudice as reflected in the individual trial record, taking into account '(1) the state of the evidence, (2) the effect of other instructions, (3) the effect of counsel's arguments, and (4) any indications by the jury itself that it was misled.' " (*Rutherford v. Owens-Illinois, Inc., supra,* 16 Cal.4th at p. 983.)

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[8] BAJI 12.01 reads: "The essential elements of a claim for [disparate treatment] unlawful employment discrimination are:

"1. Defendant was a[n] [(employer, etc.)];

"2. Plaintiff was an [employee of] [(other)] the defendant;

"3. [A.] [Defendant made a decision adverse to the plaintiff in regards to [compensation] [or] [terms, conditions or privileges of employment];]

"[B.] [Defendant refused to [hire or employ] [promote] the plaintiff;]

"[C.] [Defendant terminated plaintiff's employment;]

"[D.] Defendant _____;]

"4. The plaintiff's [(protected status)] was a motivating factor in the defendant's [decision] [refusal] [termination] [_____]; and

"5. The defendant's [decision] [refusal to [hire or employ] [promote]] [termination] [_____] caused plaintiff injury, damage, loss or harm."

In *LeMons v. Regents of the University of California* (1978) 21 Cal.3d 869, the Court stated, "While there is no precise formula for measuring the effect of an erroneous instruction [citation], a number of factors are considered in measuring prejudice: (1) the degree of conflict in the evidence on critical issues [citations]; (2) whether plaintiff's argument to the jury may have contributed to the instruction's misleading effect [citation]; (3) whether the jury requested a rereading of the erroneous instruction [citation] or of related evidence [citation]; (4) the closeness of the jury's verdict [citation]; and (5) the effect of other instructions in remedying the error." (*Id.* at p. 876.)

Here, the trial court gave the jury the following instruction: "The essential elements of a claim for unlawful employment discrimination are, first, defendant was an employer; second, plaintiffs were each employees of the defendant; third, defendant terminated the plaintiffs' employment; fourth, the plaintiffs' national origin was a motivating factor in the defendant's decision to terminate the plaintiffs, and, fifth, the defendant's decision to terminate the plaintiffs caused each of them injury, damage, loss, or harm." The court gave BAJI 12.01.1 and defined motivating factor as "something that moves the will and induces action even though other matters may have contributed to the taking of the action."[9]

ADVO proposed an instruction that combined the third and fourth factors of BAJI 12.01 into a single element. ADVO's proposed instruction read: "The essential elements of a claim for unlawful employment discrimination are: [¶] 1. Defendant was an employer; [¶] 2. Plaintiffs were employees of the Defendant; [¶] 3. Defendant

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[9] Plaintiffs maintain that ADVO waived objecting to the instruction because it urged the court to include in BAJI No. 12.01.1 the following clause: "even though other matters may have contributed to the taking of the action." By urging the court to include this clause, which the court did, plaintiffs argue that ADVO "waived any objection to the concept that it might be liable if plaintiffs' national origin was a motivating factor in its decision to terminate them 'even though other matters may have contributed to the taking of the action.' " We need not reach the question whether this instruction addressed ADVO's concerns completely, because we conclude the court did not err in giving BAJI No. 12.01.

subjected Plaintiffs to an adverse employment action because of Plaintiffs' national origin/race; [¶] 4. Defendant's decision caused Plaintiffs injury, damage, loss or harm. [¶] The term 'adverse employment action' means action by the employer that causes a substantial and material adverse effect on the terms and conditions of plaintiff's [*sic*] employment."

The trial court rejected the modified instruction proposed by ADVO, ruling that ADVO's version could potentially confuse the jury and the unmodified version did not lighten plaintiffs' burden of proof regarding the reason for terminating their employment. The court stated that this instruction did not preclude ADVO from arguing that plaintiffs voluntarily left or abandoned their employment.

ADVO's principal contention is that Government Code section 12940, subdivision (a) provides that it is an unlawful employment practice for an employer, "because of" the national origin to discharge the person from employment. ADVO acknowledges that Title VII also makes it unlawful to discriminate against an employee "because of" the employee's national origin (42 U.S.C., § 2000e-2(a)(1)), but the federal statute also specifically provides liability if the protected trait is solely "a motivating factor" for the employer's action. (*Id.,* § 2000e-2(m).) Since the language of motivating factor is not included in FEHA, ADVO contends this language should not be in the instruction. ADVO maintains that "because of" cannot mean the same as "a motivating factor" because the federal statute uses the former in one place and the latter in another place.

ADVO argues that it is reversible error to give a jury instruction that departs from the text in a manner that introduces a different standard and cites *Richman v. San Francisco, Etc.* (1919) 180 Cal. 454, 458-459. In *Richman,* the succeeding parts of the instruction did not state the correct rule and the instruction as given did not comply with the language of the statute. (*Id.* at p. 460.) The court's instruction on damages told the jury to award them if detriment "reasonably probable will result." (*Id.* p. 458.) This instruction was in "contravention" to the statute, which only awarded damages for detriment "certain to result in the future." (*Ibid.*) In contrast, here, the instruction does

not contravene Government Code section 12940. The question is whether the instruction comports with the statute. There is no case and no authority that states the language of the instruction must be "identical" to the words in the statute as ADVO argues.

Indeed, no California court has ever held that the jury must be instructed using the "because of" language of Government Code section 12940, subdivision (a), but several courts in dicta have approved the "motivating factor" language in BAJI No. 12.01. (See, e.g., *Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189, 199 (*Caldwell*).) Although not addressing the issue of the proper instruction, our Supreme Court (in a case not cited by either party) has indicated that "a motivating factor" is the proper test under FEHA. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 358.) When determining whether the plaintiff's employment was terminated on the unlawful basis of age, our Supreme Court noted that the employer presented evidence that the reason for the employment decision was lawful, the company was downsizing. However, "Invocation of a right to downsize does not resolve whether the employer had a *discriminatory motive* for cutting back its work force, or engaged in intentional discrimination when deciding which individual workers to retain and release. Where these are issues, the employer's explanation must address them." (*Ibid.*, italics added.) "While the objective soundness of an employer's proffered reasons supports their credibility . . . the ultimate issue is simply whether the employer acted with *a motive to discriminate illegally*." (*Ibid.)* Our Supreme Court concluded that summary judgment was proper in the case before it because the employer provided an innocent explanation for its action and the "evidence as a whole is insufficient to permit a rational inference that the employer's actual motive was discriminatory." (*Id.* at p. 361, fn. omitted.) Thus, our Supreme Court held that the test under FEHA does not differ from that under Title VII and a court reviewing a claim of discrimination under FEHA must review the record to determine whether the evidence in the record established that the "motive was discriminatory."

ADVO also stresses that the case before us is a pretext rather than a mixed motive case. ADVO asserts that in a pretext case, the plaintiff must show that a protected trait

was a "determinative factor" or "determining factor." (E.g., *Ewing v. Gill Industries, Inc.* (1992) 3 Cal.App.4th 601, 612; see also *Heard v. Lockheed Missiles & Space Co.* (1996) 44 Cal.App.4th 1735, 1748-149.) In a mixed motive case, the plaintiff need only show that the protected trait was a "motivating factor." (E.g., *Watson v. SEPTA* (3rd Cir. 2000) 207 F.3d 207, 215.) However, in the latter case, ADVO argues that the jury should only get to the mixed motive instruction if it has already been established that the defendant's explanation is a pretext and the real reason is discrimination.[10] ADVO asserts that the court should have instructed on pretext and it maintains that plaintiffs failed to present sufficient evidence to support such an instruction.[11]

This argument merits little discussion. ADVO has confused the legal burden of proof that the court must decide before letting a claim of discrimination proceed to the jury with what the jury ultimately decides. Under the three-stage burden-shifting test, commonly known as the *McDonnell Douglas* test (*McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792): "(1) The complainant must establish a prima facie case of discrimination; (2) the employer must offer a legitimate reason for [the] actions; (3) the complainant must prove that this reason was a pretext to mask an illegal motive." (*Clark v. Claremont University Center* (1992) 6 Cal.App.4th 639, 662.) However, the burden-shifting framework of *McDonnell Douglas* is relevant only to the legal question of whether the litigants have created an issue of fact to be resolved by the jury. "Thus, the construct of the shifting burdens of proof enunciated in *McDonnell Douglas* is an

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[10] ADVO cites and relies on *Fuller v. Phipps* (4th Cir. 1995) 67 F.3d 1137, 1142 (*Fuller)*, which held that direct evidence is necessary to prove employment discrimination in mixed motive cases. However, *Fuller* was overruled in *Desert Palace, Inc. v. Costa* (2003) 539 U.S. 90.

[11] Plaintiffs assert that ADVO has waived any challenge to the instruction based on a failure to instruct on pretext since it did not request such an instruction. ADVO responds that its request for the modified version of BAJI No. 12.01 was sufficient. We need not address this issue since we are holding the court did not err in providing the unmodified version of BAJI No. 12.01 and an additional instruction regarding pretext was not required.

analytical tool for use by the trial judge in applying the law, not a concept to be understood and applied by the jury in the fact finding process." (*Caldwell v. Paramount Unified School Dist., supra,* 41 Cal.App.4th at p. 202.) For this reason, the issues raised by the shifting burdens of proof are amenable to pretrial proceedings such as demurrer or summary judgment. (*Ibid.*) "By the time that the case is submitted to the jury, however, the plaintiff has already established his or her prima facie case, and the employer has already proffered a legitimate, nondiscriminatory reason for the adverse employment decision, leaving only the issue of the employer's discriminatory intent for resolution by the trier of fact. Otherwise, the case would have been disposed of as a matter of law for the trial court. That is to say, if the plaintiff cannot make out a prima facie case, the employer wins as a matter of law. If the employer cannot articulate a nondiscriminatory reason for the adverse employment decision, the plaintiff wins as a matter of law. In those instances, no fact finding is required, and the case will never reach a jury." (*Id.* at p. 204.) The *Caldwell* court cautioned that if litigants fail to seek determinations from the trial court on whether the intermediate burdens of *McDonnell Douglas* have been satisfied, such as a moving for a directed verdict, those burdens fall away. The jury must then decide only the ultimate issue of whether the employer's discriminatory intent was a motivating factor in the adverse employment decision. (*Id.* at pp. 204-205.)

Accordingly, we hold that the trial court did not err in giving BAJI 12.01 without the modification proposed by ADVO.

DISPOSITION

The judgment is affirmed. Plaintiffs are awarded costs.

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Lambden, J.

We concur:

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Kline, P.J.

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Haerle, J.